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In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD, PETITIONER
v.
HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION
and
MALLEABLE IRON RANGE COMPANY

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTIONS PRESENTED

1. Whether the Board properly concluded that nonmanagerial "confidential employees" are entitled to the full protection of the National Labor Relations Act unless they assist and act in a confidential capacity to officials who formulate, effectuate, and determine labor relations policies, or regularly have access to information concerning anticipated changes that may result from collective-bargaining negotiations, in which case they may not participate in bargaining units comprised of other employees.

2. Whether the court of appeals properly concluded that Hendricks employee Mary Weatherman was not a "personnel department employee."

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OPINIONS BELOW

The opinion of the court of appeals in *Hendricks* (Pet. App. 1a-13a)[1] is reported at 627 F.2d 766. The supple-

[1] "Pet. App." refers to the appendix to the petition in No. 80-885. "A." refers to the joint appendix filed in this Court. "Tr." refers

mental decision and order of the National Labor Relations Board (Pet. App. 16a-21a), on prior remand from the court of appeals, are reported at 247 N.L.R.B. No. 68. The prior opinion of the court of appeals (Pet. App. 22a-32a), remanding the case to the Board, is reported at 603 F.2d 25. The Board's original decision and order (Pet. App. 33a-55a) are reported at 236 N.L.R.B. 1616.

The opinion of the court of appeals in *Malleable* (Pet. App. 56a-60a) is not reported. The decision and order of the Board (Pet. App. 62a-75a) are reported at 244 N.L.R.B. No. 64. The Regional Director's decision and direction of election in the underlying representation proceeding (Pet. App. 76a-94a) are not reported.

JURISDICTION

The judgment of the court of appeals in *Hendricks* (Pet. App. 14a-15a) and the judgment of the court of appeals in *Malleable* (*id.* at 61a) were entered on July 21, 1980. On October 8, 1980, Justice Stevens extended the time for filing the petition for a writ of certiorari to and including November 18, 1980, and, on November 10, 1980, Justice Stevens further extended the time for filing the petition to and including December 2, 1980. The Board's petition for a writ of certiorari in No. 80-885 was filed on December 1, 1980. Hendricks' cross-petition for a writ of certiorari in No. 80-1103 was filed on January 3, 1981, and both petitions were granted on March 2, 1981 (A. 81, 82). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

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to the transcript of the administrative proceedings in *Malleable*, which is part of the original record that has been lodged with the Court. "*Legis. Hist.*" refers to NLRB, *Legislative History of the Labor Management Relations Act* (1947). "*Senate Hearings*" refers to *Labor Relations Program: Hearings on S. 55 and S.J. Res. 22 Before the Senate Comm. on Labor and Public Welfare*, 80th Cong., 1st Sess. (1947). "*House Hearings*" refers to *Amendments to the National Labor Relations Act: Hearings on H.R. 8, H.R. 725, H.R. 880, H.R. 1095, and H.R. 1096 Before the House Comm. on Education and Labor*, 80th Cong., 1st Sess. (1947).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth in the Appendix to this brief.

STATEMENT

A. Hendricks

1. On May 9, 1977, Wallace E. Dillon, the general manager of Hendricks County Rural Electric Membership Corporation, Danville, Indiana, discharged his secretary, Mary Weatherman, because she had signed a petition calling for the reinstatement of Lloyd Hadley, a close friend and fellow employee, who had lost an arm while at work.[2] Weatherman subsequently filed with the National Labor Relations Board an unfair labor practice charge, in which she alleged that the discharge violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1). Hendricks defended against the charge by claiming, among other things, that Weatherman was excluded from coverage under the Act because her duties were allegedly those of a "confidential secretary" and a "personnel department employee." Based on the Board's definition of "confidential employees" as "employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations" (*B.F. Goodrich Co.*, 115 N.L.R.B. 722, 724 (1956)), the administrative law judge rejected Hendricks' contention (Pet. App. 43a-49a). The ALJ found that Dillon had minimal responsibility for labor relations matters and

[2] Hadley became disabled in February 1976. In March 1977, he sought reemployment with Hendricks, but his application was denied. Subsequently, Weatherman and 25 other employees signed a petition that was addressed to the company's board of directors and urged reconsideration of this decision. When Dillon learned that the petition had been signed by Weatherman, an employee of nine years' standing, she was immediately discharged. Pet. App. 38a-43a.

that Weatherman had no responsibility for assisting Dillon in this area.

The ALJ found (Pet. App. 47a) that Dillon played a "most passive role in labor and employee relations matters." Indeed, Dillon testified (*id.* at 46a n.10, 47a; A. 23, 25-26) that he did not participate in the formulation of Hendricks' labor relations policies, that he had "very little" to do with union negotiations,[3] that he had "no" function whatsoever in "interpreting the labor contracts and labor relations among employees," and that he had only tangential responsibility with respect to other employee "problems."

The ALJ also found (Pet. App. 45a) that "the range of [Weatherman's own] duties was deliberately restricted so as to preclude her" from acting in a "confidential capacity" to Dillon with respect to the few labor relations matters that he did handle. For example, although Weatherman was generally responsible for opening the incoming mail, union-related correspondence from Hendricks' attorneys was removed by the office manager before it reached Weatherman's desk (Pet. App. 45a; A. 14-15). Similarly, status reports concerning ongoing labor negotiations were hand-delivered to Dillon by Hendricks' attorneys, and Weatherman had no duties relating to such reports, which Dillon personally filed (Pet. App. 47a & n.13; A. 29-32). Weatherman placed few of Dillon's telephone calls; she was not generally privy to the content of his telephone or other conversations; and she did not keep track of his appointments (Pet. App. 45a; A. 9-12, 18). Although Weatherman typed Dillon's correspondence, the only labor-related matter involved in this task was to notify Hendricks' attorneys when union negotiating meetings would be held, which occurred only every few years (Pet. App. 46a; A. 11,

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[3] The International Brotherhood of Electrical Workers represented Hendricks' 25 non-clerical employees. Weatherman and nine other clerical employees were not represented by any labor organization. Pet. App. 38a n.2; A. 4, 5.

14). Weatherman did not attend management or directors' meetings,[4] and, although she was responsible for typing the minutes of directors' meetings (from drafts prepared by counsel), the ALJ specifically found that these documents should not be deemed "confidential" simply because they contained "occasional[]" references to personnel matters. (Pet. App. 46a-47a; A. 12.) As the ALJ noted (Pet. App. 46a), Hendricks is a cooperative, and its members (including employees) are entitled to inspect the minutes.[5] Indeed, Dillon conceded (Pet. App. 46a n.12; A. 26-27, 29-32) that Hendricks had no secret documents.

The ALJ also found that Weatherman typed no internal memoranda concerning labor policies, that she was never involved in labor negotiations or grievances, and that she had nothing to do with employee discipline or reward (Pet. App. 46a; A. 16-18). Weatherman's only personnel-related work was to assist Dillon in the formal processing of employee medical and disability insurance claims. In connection with these claims, and for her own convenience (without instruction from Dillon), she maintained informal files that were destroyed or returned to the claimants after final disposition of the claims. Pet. App. 45a; A. 11, 14, 15-16.

Having determined that Weatherman was not a "confidential employee" for purposes of the Act,[6] the ALJ further found (Pet. App. 41a-43a, 49a-51a) that Weather-

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[4] In preparation for the annual meeting, however, Weatherman generally met briefly with the board "for the purpose of getting together who was going to do what, who was going to set up chairs at the annual meeting, who was going to order sandwiches and so forth like this" (A. 18). Otherwise, she was never present at directors' meetings (Pet. App. 46a; A. 18).

[5] Moreover, the ALJ noted that "the Board has held that occasional typing of material relating to personnel problems does not render an employee confidential in nature."

[6] The ALJ also noted (Pet. App. 44a) that even if he had found Weatherman to be a "confidential employee," that fact would bear only upon her eligibility to participate in a bargaining unit com-

man had been discharged for engaging in concerted activity protected by Section 7 of the Act, 29 U.S.C. 157, and that Hendricks had thus violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1). The Board affirmed the ALJ's decision and ordered that Weatherman be reinstated with back pay (Pet. App. 33a-35a, 53a-55a).

2. The court of appeals sustained the Board's finding that Weatherman had been discharged for engaging in protected activity (Pet. App. 24a). Likewise, the court agreed that Weatherman "did not act in a 'confidential capacity' to Dillon in any meaningful sense with respect to [Hendricks'] labor relations policies," and that her limited duties with respect to such matters did not make her the "equivalent" of a "personnel department employee" (*id.* at 27a).[7] Based on its understanding of this Court's decision in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), however, the court of appeals held that "*all* secretaries working in a confidential capacity, without regard to labor relations, [must] be excluded from the Act" (Pet. App. 31a; emphasis in original). Thus, the court held that the Board's application of the "labor relations nexus" test was an "error of law" and remanded the case to the Board to determine whether, " 'by the nature of [her] duties[,]' " Weatherman was " 'given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer' " (*id.* at 27a, 31a; citation omitted).[8]

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posed of other employees, not upon her right to complain of an unfair labor practice such as that involved here. See pages 17-18 & note 14, 41-43, *infra*.

[7] The court also sustained (Pet. App. 24a n.1) the Board's finding (*id.* at 52a-53a) that Hendricks had violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by coercively interrogating another employee concerning the protected activities.

[8] Judge Bonsal, sitting by designation, dissented on the need for a remand, stating that he would enforce the Board's order because the record satisfied him "that Mary Weatherman was not a 'confidential secretary' and was covered by the Act" (Pet. App. 32a).

3. On remand, the Board accepted the standard enunciated by the court of appeals as "the law of this case only" (Pet. App. 18a-19a). Applying that standard, the Board again determined that Weatherman was not a "confidential secretary" and reaffirmed its original order. The Board stated (*id.* at 20a):

> [F]or Weatherman to qualify as a confidential employee under the standard erected by the court, the record would have to disclose that she performed confidential duties in connection with nonlabor relations or personnel areas. Quite clearly, however, the evidence taken at the hearing contains no hint that Weatherman had any such responsibilities.[9] That this was not merely an oversight in the course of litigation is confirmed by Dillon's statement that [Hendricks] simply did not have secret papers or documents.

4. By divided vote, the court of appeals denied enforcement (Pet. App. 6a-8a). The court reaffirmed its earlier holding that this Court's decision in *Bell Aerospace Co.* required the rejection of the Board's traditional "labor nexus" test and compelled the conclusion that all "confidential employees" are excluded from the Act. Although the court acknowledged (Pet. App. 3a-4a) that *Bell Aerospace Co.* held only that "all employees properly

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[9] Specifically, the Board again noted (Pet. App. 19a) that Weatherman generally did not place Dillon's telephone calls, that she did not keep track of his appointments, and that she did not attend meetings of management or the board of directors. The Board further noted (*id.* at 19a-20a & n.8) that there was no evidence that the letters Weatherman typed concerned confidential matters of any description, and, although Weatherman typed the minutes of directors' meetings, those documents could not be considered confidential in light of the cooperative members' access to them. Finally, the Board observed (*id.* at 19a & n.7) that certain significant incoming communications—the contents of which Dillon "prefer[red]" to keep private (A. 30)—never crossed Weatherman's desk.

classified as 'managerial,' rather than just those [managerial personnel] in positions susceptible to conflicts of interest in labor relations," are excluded from the Act, the court of appeals noted that this Court, in reaching that conclusion, had relied at least in part upon the premise "that 'confidential employees' were excluded from coverage under a 'broad definition' not limited to those having a labor nexus." The court of appeals then held that the Board's finding that Weatherman was not a "confidential employee," under the broad standard articulated in the court's prior decision, was not supported by substantial evidence on the record as a whole. The court noted (Pet. App. 8a) that the Board, in reaching its conclusion, had relied (*id.* at 20a) upon Dillon's testimony that Hendricks "simply did not have secret papers or documents." Giving a narrower construction to the evidence, however, the court found (*id.* at 8a; emphasis in original) that Dillon had testified only that the cooperative "had 'nothing to hide from the *members*.'" The court concluded (*ibid.*):

> That a company has no secrets from its members does not mean that it does not have matters or documents which are confidential insofar as its nonconfidential employees are concerned, insofar as its competitors are concerned, insofar as regulatory agencies are concerned, and insofar as the public is concerned.

Judge Cudahy dissented. He noted at the outset that, in light of the court's prior decision in this case, the exclusion of "a confidential *secretary* * * * from the protection of the Labor Act (whether or not the confidences are labor relations-related) * * * is, for better or for worse, the present law of this Circuit" (Pet. App. 9a; emphasis in original; footnote omitted). However, Judge Cudahy found "abundant evidence in the record to support the Board's conclusion that Weatherman is not properly classified as a confidential secretary" (*id.* at

9a-10a).[10] Moreover, he noted that there was no authority to support the majority's broader holding that all " 'confidential *employees*' (not limited to secretaries and, of course, not limited by the labor relations[] nexus) are unprotected under the Act" (Pet. App. 10a; emphasis in original). Finally, he stated (*id.* at 12a-13a; emphasis in original, footnotes omitted):

> To paint with a broad brush about the purported exclusion of "confidential employees" (other than those having the well-accepted "labor nexus") from the protection of the Act may be to strike a major blow at white collar unionism. Many, *if not most*, white collar workers are involved in something which may be argued to be "confidential" in some general sense. There are matters of credit, of costs, of designs, of customer lists, of prices, of medical records—the list is endless. I do not perceive at all that the dicta of *Bell Aerospace* point down this road.

B. Malleable

1. On December 18, 1978, Local 39 of the Office and Professional Employees International Union, AFL-CIO-CLC, filed a representation petition seeking certification as the collective bargaining agent for a unit of office clerical, technical, and professional personnel employed by Malleable Iron Range Company, a manufacturer of castings, appliances, and jobbing work in Beaver Dam, Wisconsin (Pet. App. 56a-57a, 66a). At the subsequent rep-

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[10] Judge Cudahy observed (Pet. App. 10a; emphasis in original):

> [Hendricks'] strongest (or at least most fully developed) argument to the contrary seems to be that Weatherman was responsible for processing employees' medical and disability insurance claims—admittedly confidential. But these were the confidences of *employees* she had to keep. It is simply ludicrous that one should be classified as part of "management" and lose the protections conferred on "labor" because one is entrusted with the confidences of one's fellow workers.

resentation hearing, Malleable claimed, among other things,[11] that 18 of the approximately 64 unit employees were excluded from the Act by reason of their access to allegedly confidential—albeit not labor-related—business information. The allegedly excluded employees were four engineers and three draftsmen in Malleable's technical services section; three assistants to the manager of the distribution-traffic-product service department; an "inside" salesman; the assistants to the managers of the advertising, cost, computer services, and credit departments; a computer operator; an assistant bookkeeper; and the industrial sales manger's secretary.

The evidence at the representation hearing showed that technical services engineers Kaiser, Heidemann, and Nagarkar test the company's appliances against industry code specifications (such as those promulgated by Underwriter's Laboratories) and make design modifications and component purchases necessary to ensure compliance (Pet. App. 80a-81a; Tr. 318-322, 329-331, 460). Engineer Murphy, as a production process coordinator, writes up the company's production methods for computer programming (Pet. App. 80a-81a; Tr. 311, 322-323). Draftsmen Herbst, Kostolni, and Lehmann design product blueprints (Pet. App. 80a; Tr. 310, 314-315, 318). In the course of their duties, these engineers and draftsmen have access to product specifications and test results (sometimes relating to patentable products) which are not available to the public or to employees in other departments (A. 35-36, 52). The engineers also gain knowledge of the costs of manufacturing particular products (A. 52-53).

Kuzniewicz, Schmitt, and Holloway are assistants to the manager of the distribution-traffic-product service department, a division of the consumer products marketing section. Holloway, who earns $3.50 an hour, is es-

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[11] See page 40, note 47, *infra*.

sentially a shipping clerk and performs such tasks as routing shipments, preparing bills of lading, tracing lost deliveries, and handling damage claim reports (Pet. App. 82a; A.54; Tr. 503-504, 733-735). Schmitt, who earns an annual salary of $10,500, handles all paperwork relating to shipments to and from Malleable's warehouses, and she is responsible for notifying her superiors when stock is low at a particular location (Pet. App. 82a; Tr. 497-502, 719, 721-722, 725). Kuzniewicz, who earns $6,400 a year, handles correspondence and telephone calls concerning difficulties with the company's products, and she is responsible for issuing credits on defective merchandise (Pet. App. 82a; A. 55; Tr. 485, 508, 798-800, 804). She is thus privy to credit data (which Malleable would keep confidential) that might bear upon product liability matters or reveal to competitors strategic "weakness[es]" in the company's products (A. 54-56). Kuzniewicz and Schmitt also have access to Malleable's dealership lists, which it considers an "invaluable price-list tool for anyone that wants to compete with us" (A. 56). Finally, all three assistants have access to daily sales volume figures, which company officials consider confidential as to competitors "because any time a competitor can learn how you're doing dollarwise, it would be a great help to him in damaging our reputation" (A. 54).

Pfingsten, the "inside" salesman, solicits distributors by telephone in distant areas. Through his work, Pfingsten gains access both to allegedly confidential data concerning sales volume in various areas and to lists of out-of-state distributors (Pet. App. 84a; A. 57-58). Christopherson, the assistant to the advertising department manager, writes advertising copy and helps coordinate advertising efforts with other departments and with the media. In the course of his duties, which include routing customer inquiries to appropriately located dealers, he also has access to distributorship lists. Pet. App. 83; A. 38, 58-59; Tr. 55, 61-62, 527-529.

Soldner is the assistant to the manager of the cost department, which collects overhead data from Malle-

able's various departments. By obtaining material and labor costs from previously-prepared cost sheets and adding a pre-determined markup specified by the company controller, Soldner "costs out" range, factory sales, and foundry parts. He therefore has access to profit percentages and "cost tests" that are not available to the public or to employees in other departments. Pet. App. 88a-89a; A. 49-51; Tr. 834-835.

Wendlandt assists the manager of the computer services department and prepares programs relating to Malleable's financial matters, such as receivable and payable accounts, payroll checks, and sales-cost analyses. Anderson is a computer operator who works with Wendlandt in processing this data. Certain of the financial reports (and underlying raw data) which these employees handle reveal assertedly confidential cost and profit-margin information. Pet. App. 88a, 89a; A. 42, 47-48, 67-70; Tr. 135-136.

Krause, the assistant to the credit department manager, checks in the cash each day and records it on the company's ledgers. He also determines whether dealers are delinquent by looking at monthly statements, and he updates dealer correspondence. Krause also checks customer credit ratings and assists customers in arranging security interests on credit transactions by ensuring that the required papers are properly prepared and the correct fees are paid. In the course of this work, Krause has access to information concerning both the volume of Malleable's accounts receivable and the status of particular credit accounts, information that management would "not want to leave the company." Pet. App. 90a; A. 59-61, 73-74; Tr. 588-589, 850-851.

Assistant bookkeeper Schwantes prepares cash-intake summaries and accounts payable paperwork for submission to data processing (Pet. App. 90a; A. 59, 74). Finally, Oelke, who is the industrial sales manager's secretary, handles calls from customers concerning pricing and delivery. She also transfers data from purchase orders to Malleable's internal procurement forms, ar-

ranges times for delivery of certain company products, and ensures that various materials are picked up from suppliers. In the course of her duties, she has access to information concerning anticipated price increases, and she routinely handles such cost data as price quotations from the company's suppliers. Pet. App. 85a; A. 63-67; Tr. 620-621.

Applying the Board's "labor nexus" test, the Regional Director found that these employees were properly included in the bargaining unit because none of them worked "in a confidential capacity for a person involved in the formulation, determination and effectuation of the Employer's labor relations policies" (Pet. App. 82a, 84a, 85a, 89a, 90a). An election was held, in which Local 39 prevailed by a vote of 40 to 15, and the Board certified Local 39 as the bargaining agent (Pet. App. 65a, 68a). Malleable contested the validity of the certification, however, and refused to bargain with the union, which subsequently filed charges with the Board. The Board found that Malleable's refusal to bargain violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5), and a bargaining order was issued (Pet. App. 68a-72a).

2. By divided vote, the court of appeals denied enforcement, stating that (Pet. App. 58a):

> [Malleable] has contended that at least 18 of its employees should be excluded from the unit because they have access to confidential information and are therefore confidential employees. The Board conceded that in determining the employees included in the unit it applied "the Board's traditional 'labor nexus' test" and not the test or standard established in the *Hendricks* case.

Accordingly, the case was remanded to the Board for further consideration in light of the decision in *Hendricks* (Pet. App. 59a).[12]

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[12] Judge Cudahy dissented from the remand order with respect to 17 of the 18 employees whose coverage was at issue (Pet. App. 60a). He conceded, however, that a remand "might be needed"

SUMMARY OF ARGUMENT

1. a. The Board's present policy with respect to "confidential employees" is consistent with more than 40 years of administrative and judicial practice, and with the legislative history of the Taft-Hartley amendments. Although the original Wagner Act did not in terms require exclusionary treatment of confidential employees, the Board routinely excluded from rank-and-file bargaining units employees (such as confidential secretaries to labor relations management personnel) with access to strategic labor relations information that could prejudice the employer's position at the bargaining table. The scope of this exclusionary rule was limited, however, to persons whose "labor nexus" was substantial. The rule did not apply, for instance, to secretaries to management personnel who had only tangential responsibility for labor relations matters, and it did not apply at all to persons with access to confidential non-labor-related business information. With respect to these individuals, the Board repeatedly held—and the courts of appeals agreed—that there was no inherent conflict between self-organization under the Act and the faithful performance of confidential duties. Rather, the appropriate remedy for individual breaches of an employer's trust was perceived to rest with the employer's prerogative to discipline or discharge the offending employee.

b. When the Eightieth Congress was considering the Taft-Hartley amendments in 1947, the House passed legislation that would have excluded from the Act as "supervisors" all employees with access to an employer's confidential business information, labor related and otherwise. Members of Congress, labor representatives, and Board Chairman Herzog all warned that such a broad exclusion would deny statutory protection to "large

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under the court's first decision in *Hendricks* with respect to the secretary to the industrial sales manager, the "[o]nly one of the challenged employees [who] is a secretary" (*ibid.*).

classes of white-collar workers" who were neither managerial nor truly supervisory. The Conference Committee rejected the House bill in favor of the Senate version, which did not exclude "confidential employees" of any description, and which expressly provided statutory coverage for professional employees, who often had routine access to highly confidential business information. The conferees specifically noted their approval of the "prevailing Board practice" with respect to confidential employees, and stated their intention not to alter that practice "in any respect."

c. After the enactment of the Taft-Hartley amendments, and to this day, the Board continued to accord to all "confidential employees" the protection of the Act, and to exclude from rank-and-file bargaining units only those with a substantial "labor nexus." This narrow exclusionary practice has been repeatedly sustained by the courts of appeals, and was left undisturbed by Congress in 1959, when it again rejected proposals to alter the practice while adopting other amendments to the Act.

d. This Court's decision in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), raises no question concerning the Board's practice with respect to "confidential employees." The policies of the Act that led the Court to exclude all managerial employees from statutory coverage do not dictate a similar result with respect to "confidential employees," and the Board's present exclusionary rule with respect to confidentials—unlike its attempt in 1970 to effect an innovative narrowing of the managerial exclusion—is supported by several decades of consistent administrative practice. Moreover, the suggestion in *Bell Aerospace Co.* that the Eightieth Congress may have intended a categorical exclusion of "confidential employees"—comparable to that contained in the unenacted House bill—is contradicted by Congress' express inclusion of professional employees, many of whom necessarily have routine access to confidential information. Finally,

adoption of the broad exclusionary standard for "confidential employees" enunciated by the court below would strike a major blow at statutory protection both for the growing white-collar workforce and for many skilled blue-collar workers, and would constitute a departure from the statutory language and policy and from widespread practice that should not be countenanced in the absence of a clear expression of congressional intent.

2. The Board properly found that the employees in these cases were not "confidential employees" for purposes of the Act. The employees whose status is at issue in *Malleable* are not alleged to have any "labor nexus," and the secretary involved in *Hendricks* did not serve in any confidential capacity, much less with respect to labor relations matters. Moreover, even if the secretary in *Hendricks* were determined to be a confidential secretary and excludable from a rank-and-file bargaining unit on that basis, neither the public policy of the Act nor its legislative history supports the conclusion that she was not protected by the Act with respect to her employer's unfair labor practices.

3. Hendricks' additional assertion that the secretary was a personnel department employee was properly rejected both by the Board and by the court of appeals. The record shows that she had nothing to do with employee grievances, discipline, or reward. The only confidential personnel-type materials that she handled were employees' medical and disability insurance claim forms, and these reflected the confidences of her fellow employees, not those of the employer.

ARGUMENT

I. ALL NON-MANAGERIAL CONFIDENTIAL EMPLOYEES ARE FULLY PROTECTED BY THE NATIONAL LABOR RELATIONS ACT, BUT THOSE WHO ASSIST AND ACT IN A CONFIDENTIAL CAPACITY TO OFFICIALS WHO FORMULATE, EFFECTUATE, AND DETERMINE LABOR RELATIONS POLICIES, OR REGULARY HAVE ACCESS TO INFORMATION RELATING TO COLLECTIVE BARGAINING STRATEGY, ARE PROPERLY EXCLUDED FROM BARGAINING UNITS COMPRISED OF OTHER EMPLOYEES

For at least 40 years, the Board has ruled that all non-managerial confidential employees are fully protected by the National Labor Relations Act, but that those who assist and act in a confidential capacity to officials who formulate, effectuate, and determine labor relations policies, or regularly have access to confidential information concerning labor relations, should be excluded from bargaining units of other employees. Neither the Board nor any other court of appeals has ever recognized the broad exclusion created by the decision below. In this section, we trace the development of the Board's approach under the Wagner Act of 1935, ch. 372, 49 Stat. 449, and show that Congress, despite repeated amendments to the Act, has not seen fit to amend the law in this respect. We then show that the Board's approach is not inconsistent with *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), in which the Court considered the very different question whether managerial employees should be excluded from the protection of the Act without regard to whether their immediate responsibilities encompass labor relations matters.

A. "Confidential Employees" Were Not Excluded From Protection Under the Wagner Act

The Wagner Act did not in terms exclude "confidential employees" from the definition of "employees" covered by the Act, nor did it provide that "confidential em-

ployees" should be treated differently from other employees. See 49 Stat. 449, 450.[13] Shortly after the Wagner Act became law, however, the Board determined as a matter of statutory policy that employees with access to confidential labor-related information should be excluded from bargaining units comprised of employees who did not have access to such information.[14] See *Western Union Telegraph Co.*, 38 N.L.R.B. 492, 499-500 (1942) (authorization clerk with custody of confidential employment relations materials); *Creamery Package Manufacturing Co.*, 34 N.L.R.B. 108, 110 (1941) (stenographer who made confidential reports and took dictation concerning labor problems); *Bethlehem Steel Co.*, 61 N.L.R.B. 854, 856 (1945) (clerk who had access to correspondence dealing with labor relations and grievances). In *Hoover Co.*, 55 N.L.R.B. 1321, 1323 (1944) (footnote omitted), the Board explained the justification for this policy:

> [I]n negotiating and in the settlement of grievances, the interests of a union and the management are ordinarily adverse. Consequently, we have adhered to the opinion that the management should not be required to handle labor relations matters through employees who are represented by the union with which the [c]ompany is required to deal and

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[13] Similarly, the current statutory definition of "employee" contains no reference to "confidential employees." See Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3).

[14] However, the Board has treated such employees as otherwise fully protected under the Act. *See, e.g., Southern Colorado Power Co.*, 13 N.L.R.B. 699, 710 (1939), enforced, 111 F.2d 539 (10th Cir. 1940); *Coopersville Cooperative Elevator Co.*, 77 N.L.R.B. 1083, 1084-1085 & n.6 (1948); *American Book-Stratford Press, Inc.*, 80 N.L.R.B. 914, 915 (1948); *Southern Greyhound Lines, Div. of Greyhound Lines, Inc.*, 169 N.L.R.B. 627 & n.2 (1968), enforced, 426 F.2d 1299, 1301 (5th Cir. 1970); *Service Technology Corp.*, 196 N.L.R.B. 1036, 1043 (1972), enforced, mem., 480 F.2d 923 (5th Cir. 1973) (table), cert. denied, 415 U.S. 948 (1974); *Peavey Co.*, 249 N.L.R.B. 853 n.3 (1980), enforced in relevant part, Nos. 80-2092 & 80-2128 (7th Cir. May 6, 1981), slip op. 4-5. But see *NLRB v. Wheeling Electric Co.*, 444 F.2d 783 (4th Cir. 1971).

> who in the normal performance of their duties may obtain advance information of the [c]ompany's position with regard to contract negotiations, the disposition of grievances, and other labor relations matters.[15]

Accord, *Brooklyn Daily Eagle*, 13 N.L.R.B. 974, 986 (1939).

Thus, the Board routinely excluded from bargaining units confidential secretaries and clerks to managerial employees who had significant labor relations responsibilities.[16] For the same reason, the Board also generally excluded non-supervisory employees in labor relations, employment, and personnel departments, as well as time-study personnel.[17] However, the Board endeavored to limit the scope of its implied exclusion from the broad statutory coverage to those circumstances in which the *Hoover Co.* rationale truly applied. Thus, the Board

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[15] In *Hoover Co.*, the Board found inappropriate even a separate unit of employees with access to confidential labor-related information where the union seeking to represent them also represented the employer's production and maintenance complement. Accord, *Electric Boat Co.*, 57 N.L.R.B. 1348, 1349 (1944).

[16] See, *e.g.*, *Willys Overland Motors, Inc.*, 9 N.L.R.B. 924, 931 (1938) (private secretary to personnel manager); *Brooklyn Daily Eagle, supra*, 13 N.L.R.B. at 986 & n.7 (secretaries to managing editor and editor who had "ultimate power of management" in union dealings); *Babcock & Wilcox Co.*, 52 N.L.R.B. 900, 903 (1943) (executives' secretaries whose duties encompassed labor relations matters); *United States Automatic Corp.*, 58 N.L.R.B. 662, 664 (1944) (secretary to director of industrial relations); *New York Telephone Co.*, 53 N.L.R.B. 307, 310 (1943) (clerks to office managers with substantial labor-related duties); *Youngstown Sheet & Tube Co.*, 56 N.L.R.B. 559, 562 (1944) (clerks to general foreman).

[17] See, *e.g.*, *Consolidated Vultee Aircraft Corp.*, 54 N.L.R.B. 103, 105-106 (1943) (labor relations department employees); *Youngstown Sheet & Tube Co., supra*, 56 N.L.R.B. at 562 (employment department employees); *Montgomery Ward & Co.*, 36 N.L.R.B. 69, 72 (1941) (personnel department employees); *Yale & Towne Manufacturing Co.*, 60 N.L.R.B. 626, 628-629 (1945) (time-study personnel).

declined to exclude secretaries of managerial personnel who had only an insubstantial "labor nexus,"[18] secretaries with restricted access to confidential labor relations information possessed by their principals,[19] and individuals who possessed only non-strategic, albeit otherwise confidential, information pertaining to labor relations matters.[20]

The narrow scope of this exclusionary rule was further underscored by the Board's consistent refusal to exclude from bargaining units employees with access to non-labor-related confidential business information, on the ground that "the possession of important information is of itself insufficient to justify exclusion from the right to collective bargaining." *Creamery Package Manufacturing Co., supra*, 34 N.L.R.B. at 111. With respect to such individuals, the Board "s[aw] no necessity for any conflict" between "self-organization" and "the faithful performance of duty," and observed that "the remedy for * * * willful disregard or neglect of duty on the part of these employees lies implicitly in the power of the [employer] to discipline or discharge them." *Armour & Co.*, 49 N.L.R.B. 688, 690-691 (1943) (permitting union representing rank and file to represent plant clerks who

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[18] See, *e.g.*, *Brooklyn Daily Eagle, supra*, 13 N.L.R.B. at 987 & n.9 (secretaries to advertising, classified advertising, and circulation managers); *Coolerator Co.*, 53 N.L.R.B. 461, 463 (1943) (secretaries to cost accountant, assistant purchasing agent, credit and traffic manager, sales manager, purchasing agent, factory accountant, and safety director).

[19] See, *e.g.*, *Illinois Consolidated Telephone Co.*, 61 N.L.R.B. 447, 454 (1945) (general auditor's secretary, who did not have access to his confidential labor relations reports).

[20] See, *e.g.*, *Consolidated Vultee Aircraft Corp., supra*, 54 N.L.R.B. at 112-113 (clerks who handled confidential employment and personnel records); *Aluminum Co.*, 61 N.L.R.B. 1066, 1072 (1945) (senior account clerk with access to labor relations data of "principally historical importance").

collected, checked, and tabulated confidential production data).[21]

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[21] The Board thus refused to exclude from bargaining units various employees who had access to non-labor-related confidential information. See, *e.g.*, *Willys Overland Motors, Inc., supra*, 9 N.L.R.B. at 932-933 (engineers and other research and development employees performing "confidential" work); *Bull Dog Electric Products Co.*, 22 N.L.R.B. 1043, 1046 (1940) (draftsmen and engineers with access to "confidential matters"); *Creamery Package Manufacturing Co., supra*, 34 N.L.R.B. at 110-111 (blueprint machine operator with access to confidential documents); *Warner Bros. Pictures, Inc.*, 35 N.L.R.B. 739, 743-744 (1941) (legal, trust, and tax department employees); *Poultrymen's Service Corp.*, 41 N.L.R.B. 444, 447-448 (1942), enforced, 138 F.2d 204 (3d Cir. 1943) (office employees with access to "important" business information); *Bendix Products Div.*, 43 N.L.R.B. 912, 915-916 (1942) (laboratory employees with research information employer kept from competitors and customers); *Fairmont Creamery Co.*, 44 N.L.R.B. 941, 944-945 (1942) (office employees with access to price, accounts receivable, credit, and other "important" financial information); *Buffalo Arms Corp.*, 46 N.L.R.B. 1176, 1178 (1943) (shipping room employees with access to "highly confidential" information respecting the destination and quantity of employer's military products); *Bethlehem Steel Corp.*, 52 N.L.R.B. 1217, 1219-1220 (1943) (order department employees with access to "confidential" price and product-specification information); *Colonial Broach Co.*, 53 N.L.R.B. 846, 847-848 (1943) (employees with access to "confidential" financial information); *General Motors Corp., Chevrolet Motor Div.*, 53 N.L.R.B. 1096, 1102 (1943) (clerk trainees with access to machinery production schedules, cost records, and trade secrets); *Consolidated Vultee Aircraft Corp., supra*, 54 N.L.R.B. at 112-113 (clerks who handled confidential production schedules); *California Spray-Chemical Corp.*, 54 N.L.R.B. 1366, 1369 (1944) (research chemists); *Hudson Motor Car Co.*, 55 N.L.R.B. 509, 511 (1944) (comptometer operators, general audit employees, and buyers' secretaries); *Licoreria Roses, Inc.*, 55 N.L.R.B. 1324, 1327 (1944) (rum-blending assistants with knowledge of employer's trade secrets); *Bell Aircraft Corp.*, 56 N.L.R.B. 1356, 1359 (1944) (laboratory employees performing "secret" work on war products); *General Motors Corp., Chevrolet Gear & Axle Div.*, 56 N.L.R.B. 1547, 1549-1550 (1944) (office employees with access to "confidential management information and secret data with respect to the fulfillment of war contracts"); *B.F. Hirsch, Inc.*, 57 N.L.R.B. 59, 65-66 (1944) (shipping, receiving, and stock-

The *Creamery Package* doctrine was upheld by the only two courts of appeals that had occasion to review it under the Wagner Act. In *NLRB* v. *Armour & Co.*, 154 F.2d 570 (10th Cir. 1945), enforcing 54 N.L.R.B. 1005 (1944), the Tenth Circuit explicitly rejected the contention that employees who had access to "confidential" business information were for that reason disqualified from collective bargaining. Adopting the Board's rationale, the court concluded that (154 F.2d at 573-574):

> [E]xclusion from the benefits of the Act is not the price of honest and faithful service. It is true that the knowledge which the [employees in question] obtain is of a highly confidential nature and that its disclosure to competitors * * * might result in injury to [their employer]. But, we do not think those

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room employees with access to confidential blueprints and price data); *John Deere Spreader Works of Deere & Co.*, 57 N.L.R.B. 411, 413 (1944) (experimental field employees with access to "secret" information relating to product test results); *United States Automatic Corp., supra*, 58 N.L.R.B. at 664 (senior and junior secretaries, accounting clerks, general clerks, and payroll clerks, with access to confidential business information); *Murray Ohio Manufacturing Co.*, 61 N.L.R.B. 47, 57 (1945) (design lay-out engineers and detail draftsman who possess "information important to the Company from a business point of view"); *American Smelting & Refining Co.*, 61 N.L.R.B. 506, 508 (1945) (bookkeeper with access to all financial records of employer); *Aluminum Co., supra*, 61 N.L.R.B. at 1072-1073 (clerks with access to confidential profit, manufacturing cost, and other fiscal information); *Smith Wood Products, Inc.*, 62 N.L.R.B. 920, 923 (1945) (scalers who "gain information not known to other employees" concerning employer's output); *Aircooled Motor Corp.*, 63 N.L.R.B. 1043, 1046 (1944) (experimental assemblers, experimental machinists, and endurance testers); *Wisconsin Telephone Co.*, 65 N.L.R.B. 368, 377 (1945) (traffic engineering assistant with knowledge "of future plans of the company"); *Barrett Div., Allied Chemical & Dye Corp.*, 65 N.L.R.B. 903, 908 (1946) (construction record, accounts payable, distribution code, power department, and receiving clerks); *Sears, Roebuck & Co.*, 66 N.L.R.B. 285, 287 (1946) (clerical employees with access to "important business information").

> facts take the [employees] outside the [protection of the Act.] [Their employer] may require, as a condition of employment, that [the employees] treat such information as confidential.

Likewise, the Third Circuit declared that the Board's limited exclusionary policy was "sound." *NLRB* v. *Poultrymen's Service Corp.*, 138 F.2d 204, 210-211 (1943), enforcing 41 N.L.R.B. 444 (1942).[22]

In 1946, the Board restated the "labor nexus" test in somewhat narrower terms. In *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322 (1946), the Board concluded that the exclusion of all employees with *mere access* to confidential labor relations matters was "too inclusive and needlessly precludes many employees from bargaining collectively together with other workers having common interests." Finding appropriate a bargaining unit composed of time-study employees,[23] the Board limited its exclusionary rule to "only those employees who assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations" (*ibid.*).[24] Accord, *Electric Controller & Manufacturing*

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[22] This Court noted (but had no occasion to pass on the validity of) the Board's *Creamery Package* decision in *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 775 (1947).

[23] Because of their specialized technical training and particular conditions of employment, and not because of their confidential status, the Board determined (66 N.L.R.B. at 1322-1323) that the time-study personnel should not be included in the bargaining unit for office clerical employees.

[24] In finding that time-study personnel do not meet this test, the Board further stated (66 N.L.R.B. at 1322; footnote omitted): "The common denominator of all time-study personnel is their performance of fact-finding duties through means of time and motion studies which are utilized by management in determining techniques of production and rates of pay. The performance of these functions alone is not sufficient to warrant their exclusion. They cannot be regarded as formulating, determining, and effectu-

Co., 69 N.L.R.B. 1242, 1246 (1946) (declining to exclude secretary to department head who did not formulate or determine labor relations policies).

B. The 1947 Taft-Hartley Amendments Did Not Affect the Coverage Of Non-Managerial "Confidential Employees"

In *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947), this Court upheld the Board's certification of a bargaining unit comprised of plant foremen.[25] Four Justices dissented on the ground that the majority opinion compromised the essential distinction between labor and management: "For if foremen are 'employees' within the meaning of the National Labor Relations Act, so are vice-presidents, managers, assistant managers, superintendents, assistant superintendents—indeed, all who are on the payroll of the company, including the president; all who are commonly referred to as the management, with the exception of the directors" (*id.* at 494). It was largely in response to this decision that Congress, in 1947, considered numerous proposals for the express exclusion of supervisors from the protection of the Act.[26] On the one hand, various industry representatives argued for a broad exclusion that would have applied not only to foremen, but also to professional employees as well as to various office and clerical employees "in whom the employer must have a great amount of confidence and trust * * *" (*Senate Hearings* at 499 (statement of

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ating management policies, for they merely supply information which may be used by the employer in establishing policy regarding labor relations. Nor can they be considered as 'confidential,' inasmuch as they are primarily concerned with the gathering of technical data, and do not assist and act in a confidential capacity to a managerial employee in the field of labor relations."

[25] *Packard Motor Car Co.*, 61 N.L.R.B. 4, 64 N.L.R.B. 1212 (1945).

[26] See, *e.g.*, H.R. 8 § 2(3), (13), H.R. 725 § 101(b), (c), S. 55 § 202, S. 360 § 2(c), 80th Cong., 1st Sess. (1947).

John R. Van Arnum)).[27] On the other hand, both the Board and representatives of labor warned that such a sweeping exclusion would leave unprotected "large classes of white-collar workers whose duties are in no sense supervisory" (*id.* at 1166 (statement of Lee Pressman)).[28] In the end, Congress rejected the broad exclusion that industry sought.

1. *The House Bill.* Taking the broad approach advocated by industry, the House passed a bill that would have excluded from the Act a wide class of supervisory employees, as well as time-study personnel, plant guards, persons working in labor relations and personnel departments, and confidential employees. H.R. 3020, 80th Cong., 1st Sess. § 2(12) (1947). Moreover, Section 2(12)(C) of the bill defined "confidential employee" as "any individual * * * who by the nature of his duties is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer."

The committee report on this bill predicted that the proposed exclusion would not effect a major change in coverage because "[m]ost of the people who would qualify

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[27] See *Senate Hearings* at 169 (statement of Theodore R. Iserman), 246 (statement of James D. Francis), 527 (statement of W. Homer Hartz), 617-618, 633 (statement of Almon E. Roth), 694-696 (statement of Charles R. Kuzell), 911 (statement of Hugh H.C. Weed), 1741, 1743 (statement of George Beardmore); *House Hearings* at 353-354, 373 (statement of Mr. Weed), 435 (statement of George S. Eaton), 537-538, 542 (statement of Grant L. Cook), 573 (statement of Mr. Roth), 664 (statement of Rolla D. Campbell), 1225 (statement of Howard I. Young), 2178 (statement of John S. Richards), 2720 (statement of Mr. Iserman).

[28] See *Senate Hearings* at 1173-1175 (statement of Edward G. Wilms), 1546 (statement of G.L. Patterson), 1862, 1907 (statement of Board Chairman Paul M. Herzog); *House Hearings* at 1190 (statement of Mr. Wilms), 2246-2247 (statement of Joseph A. Beirne), 3092 (statement of Mr. Herzog); see also *Senate Hearings* at 2056 (statement of former Board Member Gerard D. Reilly).

[under the bill] as 'confidential' employees are *executives* and are excluded from the [A]ct in any event." H.R. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947) (emphasis added). However, recognizing that the then-current Board practice was limited to "exclud[ing] from bargaining units confidential clerks and secretaries to such people as these[,]"[29] the House committee went on to set forth the policy considerations that supported a broader exclusionary rule (*ibid.*):

> [P]rotecting confidential financial information from competitors and speculators, protecting secret processes and experiments from competitors, and protecting other vital secrets ought not to rest in the administrative discretion of the Board or on the responsibility of whatever union happens to represent the employees. The bill therefore excludes from the definition of employees persons holding positions of trust and confidence whose duties give them secret information.

During the House debates on H.R. 3020, various members challenged the committee's assertion that the practical effect of the proposed exclusion would be limited, arguing that "[t]here has been no evidence submitted * * * to suggest the necessity to exclude [such] a large group of employees from the benefits of collective bargaining." 93 Cong. Rec. 3662 (1947), I *Legis. Hist.* at 847 (remarks of Rep. Jackson). For example, Representative Jackson contended that the bill would "wipe[] out of existence" the International Federation of Technical Engineers, Architects, and Draftsmen's Unions, which had "a record of splendid relations with their employers and their members" (*ibid.*). He continued (93 Cong. Rec. 3662-3663 (1947), I *Legis. Hist.* at 847):

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[29] As we have shown (see page 19, note 16, *supra*), the Board routinely excluded from bargaining units confidential assistants to executives and other high-level managerial personnel who possessed the ultimate power of management in dealings with labor.

> This organization represents a high type of membership who do the architectural, engineering, and scientific work of our country. They use their brains in seeking out new materials and new methods of production. By the very nature of their work, they have confidential information which is neither available to the public nor to their employer's competitors. As the result of their research and investigation, they are reducing the man-hours required in production and are constantly improving the design of the product of their employer in order to gain advantage over their competitors. They are loyal employees and use the confidential knowledge which they have for the benefit of their employers and they should not be prohibited from joining a union for the improvement of their economic status.

Representative Klein—echoing a labor representative's view that such a capacious exclusion would "seriously jeopardize the future of every white-collar worker" (*House Hearings* at 1190 (statement of Edward G. Wilms))—argued (93 Cong. Rec. 3446 (1947), I *Legis. Hist.* at 652) that the House bill went "much too far," and would

> remove[] from the protection of the [A]ct thousands of white-collar employees, payroll clerks, inspectors, watchmen, lead men, timekeepers, and typists. * * * Such excluded workers will not only be powerless to bargain, they will also be without protection against discharge for union membership. If they desire to organize against the employer's will[,] their only weapon will be to resort to the strike, the very result which the Wagner Act was intended to avert.

2. *The Senate Bill.* On the other hand, the Senate passed a bill that rejected the House's broad definition of "supervisor" and contained no exclusion for time-study personnel, plant guards, individuals working in labor relations and personnel departments, or confidential employees of any description. S. 1126, 80th Cong., 1st Sess. § 2(11) (1947). Indeed, Section 2(12) of the Senate Bill expressly included "professional employees" within the

coverage of the Act, thereby encompassing many individuals who necessarily would have been excluded under the House definition of "confidential employees." [30]

3. *The Conference Committee.* In conference, the Senate's view prevailed. Professional employees were specifically accorded the protection of the Act. Moreover, the conferees accepted the Senate's narrower definition of "supervisor" and deleted all references to excluding persons working in labor relations and personnel departments, confidential employees, time-study personnel, and guards.[31] See H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 35-36 (1947). The Conference Report carefully detailed the understanding of the conferees with respect to each deletion (*ibid.*):

> The conference agreement, in the definition of "supervisor," limits such term to those individuals treated as supervisors under the Senate amendment. In the case of persons working in labor relations, personnel[,] and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the [A]ct. This

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[30] The Senate Report expressed the view that such persons as architects, engineers, lawyers, and scientists should not only be protected under the Act, but should also be permitted to form bargaining units separate from those of non-professional personnel. S. Rep. No. 105, 80th Cong., 1st Sess. 11, 19 (1947).

[31] Senator Taft, who sponsored the Senate Bill, explained the conference agreement as follows (93 Cong. Rec. 6445 (1947), II *Legis. Hist.* at 1544 (emphasis added)):

> We accepted a provision regarding plant guards. We have exempted foremen in the Senate bill, but we had not exempted plant guards. The House bill exempted plant guards, and also time-study employees and personnel forces. *We did not accept any of those provisions,* except that as to plant guards we provided that they could have the protection of the Wagner Act only if they had a union separate and apart from the union of the general employees.

> is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect. The conference agreement does not treat time-study personnel or guards as supervisors, as did the House bill. Since, however, time-study employees may qualify as professional personnel, the special provisions of the Senate amendment * * * applicable with respect to professional employees will cover many in this category. In the case of guards, the conference does not permit the certification of a labor organization as the bargaining representative of guards if it admits to membership, or is affiliated with any organization that admits to membership, employees other than guards.

C. The Board's Practice With Respect To "Confidential Employees" Remained Unchanged After The 1947 Taft-Hartley Amendments

The Board continued after the enactment of the 1947 amendments to exclude from bargaining units of other employees only those confidential employees with a "labor nexus." In *Art Metal Construction Co.*, 75 N.L.R.B. 80, 83-84 (1947), for example, the Board excluded an employee who typed confidential labor relations reports, but refused to exclude a second employee, whose work concerned only non-labor-related confidential business information.[32] Likewise, in *B. F. Goodrich Co.*, 115 N.L.R.B. 722 (1956), the Board reaffirmed the "labor nexus" test as refined in *Ford Motor Co.* (see pages 23-24, *supra*), declaring (115 N.L.R.B. at 724; emphasis in original) that it would continue to exclude from bargaining units

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[32] See also *Chrysler Corp.*, 76 N.L.R.B. 50, 53 (1948) (declining to exclude office employees with access to confidential business and financial records); *Guy F. Atkinson Co.*, 83 N.L.R.B. 1004, 1005 (1949) (declining to exclude professional cost estimators with access to confidential business information); *Sargent & Co.*, 95 N.L.R.B. 1515, 1518 (1951) (declining to exclude research mechanics with access to trade secrets).

"only those employees who assist and act in a confidential capacity to persons who formulate, determine, *and* effectuate management policies in the field of labor relations." [33] In *B. F. Goodrich Co.*, the Board therefore excluded from the unit the secretaries to the personnel manager and office manager "because of the role in past and future bargaining negotiations assigned to the officials for whom they work," but included the secretaries to the plant engineer and the managers of the industrial engineering, purchasing, production, and technical divisions (*id.* at 725). Moreover, the Board continued, as it had under the Wagner Act (see pages 17-24, *supra*), to exclude individuals who, although not acting in a confidential capacity to a particular labor relations management official nonetheless regularly had access in the course of their work to "strategic" confidential labor relations information.[34]

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[33] In a few cases after *Ford Motor Co.*, the Board had returned to its original practice of designating as "confidential employees" those who merely had *access* to confidential labor relations information. See *Bond Stores, Inc.*, 99 N.L.R.B. 1029, 1031 n.4 (1952); *Minneapolis-Honeywell Regulator Co.*, 107 N.L.R.B. 1191, 1192 (1954).

[34] See, *e.g.*, *American Lithofold Corp.*, 107 N.L.R.B. 1061, 1065 (1954) (excluding general bookkeeper and chief payroll officer with access to information respecting anticipated changes in employer's pay scale that would result from negotiations with the union); *Potomac Electric Power Co.*, 111 N.L.R.B. 553, 562 (1955) (excluding clerk-stenographers and clerk-typists "who in the course of their duties regularly have access to information concerning anticipated changes which may result from collective-bargaining negotiations"); *Triangle Publications, Inc.*, 118 N.L.R.B. 595, 596 & nn.3-4 (1957) (excluding payroll clerks with access to data "showing the effect of wage adjustments contemplated in labor contract negotiations"); *Pullman Standard Div. of Pullman, Inc.*, 214 N.L.R.B. 762-763 (1974) (excluding labor cost estimators who regularly utilized employer documents disclosing managerial estimates of the anticipated results of future labor contract negotiations). Compare *American Radiator & Standard Sanitary Corp.*, 119 N.L.R.B. 1715, 1720-1721 (1958) (including personnel clerk who compiled statistical data, but had no knowledge of labor policy proposals which could result therefrom).

This was the Board's policy in 1959,[35] when Congress, in considering the Landrum-Griffin amendments, was again urged to change it, and again declined to do so.[36] This remains the Board's policy today. See *Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C.*, 253 N.L.R.B. No. 54 (Nov. 21, 1980).

The courts of appeals (except for the court below) have consistently approved the Board's narrow exclusionary policy. In *Union Oil of California, Inc.* v. *NLRB*, 607 F.2d 852, 853-854 (1979), for instance, the Ninth Circuit upheld the Board's determination that three computer operators, who were responsible for computer entry and extraction of confidential business information, were not "confidential employees" for purposes of the Act. In approving the Board's "labor nexus" test, the court noted (*id.* at 853) that the Board's narrow definition of "confidential employee" was reasonable "[b]ecause most employees have an arguably confidential relationship with management, and because an expansive application of the exclusionary rule would deprive many employees of the right to bargain collectively." Accord, *NLRB* v. *Los Angeles New Hospital*, 640 F.2d 1017, 1023 (9th Cir. 1981) (secretary's mere access to "raw, confidential" fiscal data

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[35] See, *e.g.*, *Dinkler-St. Charles Hotel, Inc.*, 124 N.L.R.B. 1302, 1304 & n.6 (1959) (declining to exclude office clericals who had access to confidential financial information).

[36] Theodore R. Iserman, representing the National Small Businessmen's Association, noted that the 1947 House Bill would have excluded from the coverage of the Act, *inter alia*, "confidential employees, such as cost estimators, development engineers, pricing specialists, and secretaries to officers and executives," and urged the Eightieth Congress to adopt that exclusion as a part of the Landrum-Griffin amendments. *Labor Management Reform Legislation: Hearings on H.R. 3540, H.R. 3302, H.R. 4473 and H.R. 4474 Before the Jt. Subcomm. of the House Comm. on Education and Labor*, 86th Cong., 1st Sess. 1473 (1959). The amendments which were enacted, however, contained no provision with respect to "confidential employees." See 73 Stat. 519.

and non-strategic labor-relations information did not render her a confidential employee); *Westinghouse Electric Corp.* v. *NLRB*, 398 F.2d 669, 670-672 (6th Cir. 1968) (declining to exclude secretaries whose principals had insufficiently substantial labor relations responsibilities).[37]

D. The Board's Continued Adherence To The "Labor Nexus" Test Is Not Inconsistent With This Court's Decision In *Bell Aerospace* And Comports With Widespread Collective Bargaining Practices As Well As Congressional Policy And Intent

Although the court below acknowledged (Pet. App. 30a) that the Board had "historically" applied the "labor nexus" test in determining the rights of "confidential employees" under the Act, the court concluded (*id.* at 28a-31a) that the legislative history of the Taft-Hartley amendments, read in light of this Court's decision in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), required the rejection of that test in favor of what is effectively the broad exclusionary rule proposed in the 1947 House bill. That conclusion is unwarranted.

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[37] See also *Service Technology Corp.*, 196 N.L.R.B. 1036, 1040-1041 (1972), enforced mem., 480 F.2d 923 (5th Cir. 1973), cert. denied, 415 U.S. 948 (1974) (declining to exclude project manager's secretary with "complete lack of contact" with labor-relations matters); *NLRB* v. *Hoerner-Waldorf Corp.*, 525 F.2d 805, 807-808 (8th Cir. 1975) (enforcing bargaining order for a unit including two employees found not to be "confidential employees" under the "labor nexus" standard); *California Inspection Rating Bureau*, 215 N.L.R.B. 780, 783 (1974), bargaining order enforced, 591 F.2d 56 (9th Cir. 1979) (declining to exclude accounting clerks with access to confidential personnel information but without access to strategic labor relations data). Compare *NLRB* v. *Allied Products Corp., Richard Brothers Div.*, 548 F.2d 644, 648-650 (6th Cir. 1977) (approving the "labor nexus" test, but rejecting the Board's application of test to the facts); *NLRB* v. *Quaker City Life Insurance Co.*, 315 F.2d 690, 692, 694 (4th Cir. 1963) (same).

In *Bell Aerospace Co.*, this Court held that all truly "managerial" employees[38] are excluded from the Act, thereby rejecting the Board's newly adopted view that only those "managerial" employees susceptible to conflicts of interest in labor relations matters should be excluded (416 U.S. at 274, 289).[39] First, the Court noted (*id.* at 275-277, 285-288) that the Board had consistently excluded all "managerial" employees from bargaining units composed of other employees until 1970. Second, the Court found that the Act's essential distinction between management and labor could not be maintained without the exclusion of all truly "managerial" employees (*id.* at 282, 284-285 n.13).[40] Finally, the Court noted that the legislative history of the 1947 amendments showed that Congress believed that certain categories of employees, including certain confidential employees, were so clearly beyond the protection of the Act that no specific exclusionary provision was deemed necessary. The Court found that " 'managerial employees' were paramount among this impliedly excluded group" (*id.* at 283-284).

Nothing in the Court's holding requires rejection of the Board's "labor nexus" test for determining the status under the Act of confidential non-managerial personnel. Whereas a "labor nexus" test was not used with respect to managerial employees until 1970, the Board has consistently applied such a test to non-managerial confidential employees since the early days of the Wagner Act. See pages 17-24, 29-32, *supra*. Moreover, as the court below conceded (Pet. App. 28a), the public policy considerations favoring categorical exclusion of true managerial personnel do not suggest any need for similar treatment

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[38] Managerial employees are employees who " 'formulate and effectuate management policies by expressing and making operative the decisions of their employer' " (416 U.S. at 288).

[39] See *North Arkansas Electric Cooperative, Inc.*, 185 N.L.R.B. 550 (1970), enforcement denied, 446 F.2d 602 (8th Cir. 1971).

[40] See *Packard Motor Car Co.* v. *NLRB*, *supra*, 330 U.S. at 494 (Douglas, J., dissenting).

of confidential employees. As this Court noted in *Bell Aerospace Co.*, "managerial" employees have "abandoned the 'collective security' of the rank and file voluntarily, because they believed the opportunities thus opened to them to be more valuable to them than such 'security' " (416 U.S. at 281 n.11, quoting H.R. Rep. No. 245, *supra*, 16-17). No such statement could realistically be made, however, with respect to the broad class of persons excluded from the Act by the Seventh Circuit's definition of "confidential employees." These persons are manifestly "workers" rather than "bosses," and they have not chosen to "abandon[] the collective security of the rank and file voluntarily." Indeed, these persons have become "confidential employees" only because their employers have chosen, for their own purposes, to have these persons handle (often in an essentially ministerial fashion) certain information that the employer would prefer not to have disseminated widely. In these circumstances, a fair balance between legitimate employer and employee interests is achieved, not by excluding all confidential employees from the Act, but by insulating the employer from the conflicts that could result from placing employees with confidential labor relations information in the same unit with other employees.

Nor is a different conclusion required by the Court's observation in *Bell Aerospace Co.* that (416 U.S. at 284 n.12):

> In 1946, in *Ford Motor Co.*, 66 N.LR.B. 1317, 1322, the Board had narrowed its definition of 'confidential employees' to embrace only those who exercised " 'managerial' functions in the field of labor relations." The discussion of "confidential employees" in both the House and Conference Committee Reports, however, unmistakably refers to that term as defined in the House bill, which was not limited just to those in "labor relations." Thus, although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover "confidential employees" even under a broad definition of that term.

This observation, which was not essential to the Court's holding in *Bell Aerospace Co.*, involves an important issue that was not fully explored by the parties in that case (since they had no need to do so). We respectfully submit that this footnote observation by the Court apparently reflects two misconceptions that are significant for present purposes (although inconsequential to the holding in *Bell Aerospace Co.*). First, the Court's observation seems to suggest that in *Ford Motor Co.* the Board announced the "labor nexus" test for the first time, as a significant departure from past practice. That is not the case, as we have previously shown (see pages 17-24, *supra*).[41] Second, the Court's restatement of the test announced in *Ford Motor Co.* combined two separate and distinct principles: that relating to "managerial" employees, and that relating to non-managerial "confidential" employees.[42] Although the combination of these principles was

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[41] Based upon the assumption that the "labor nexus" test was first announced in 1946 in *Ford Motor Co.*, the Court seems to suggest that the conferees therefore may not have been aware of that "recent" development when they gave their express approval to the "prevailing Board practice" the following year. By 1947, however, the Board had consistently applied the "labor nexus" test to confidential employees for nearly ten years, and the Board's practice had twice received explicit judicial approval during that period (see pages 17-24, *supra*). Moreover, the "labor nexus" test had repeatedly been brought to Congress' attention in the Board's annual reports. See, *e.g.*, 6 *NLRB Ann. Rep.* 34 & n.92 (1945); 8 *NLRB Ann. Rep.* 32 & nn.19-21, 56 (1946); see also 10 *NLRB Ann. Rep.* 70-71 & n.59 (1941); 11 *NLRB Ann. Rep.* 56 n.55 (1943). *Ford Motor Co.* simply narrowed the "labor nexus" test (see pages 23-24, *supra*). That modification has no significance here because the employees here would not have been "confidential employees" even under the earlier, broader test (see pages 39-41, *infra*).

[42] In *Ford Motor Co.*, *supra*, 66 N.L.R.B. at 1322 (footnote omitted), the Board carefully distinguished the two principles:

> We have customarily excluded from bargaining units of rank and file workers executive employees who are in a position to

immaterial to the analysis in *Bell Aerospace*, where the status of true "managerial" employees was at issue, the two principles must be kept separate here, where the status of only non-managerial employees is at issue. Moreover, as we have also shown (see pages 27-29, *supra*), the conferees clearly rejected not only the specific exclusion for "confidential employees" contained in the House bill, but also the general principle upon which it rested. Otherwise, Congress would not have followed the Senate version by specifically including various groups of professional employees who would by definition have routine access to various kinds of confidential information.[43] Finally, the conferees expressed their approval of the

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formulate, determine, and effectuate management policies. These employees we have considered and still deem to be "managerial," in that they express and make operative the decisions of management.

We have also excluded from units of rank and file employees persons who, in the regular course of their duties, have access to confidential data bearing directly upon the employees' labor relations, designating them as "confidential." However, upon reappraisal, we are of the opinion that this definition is too inclusive and needlessly precludes many employees from bargaining collectively together with other workers having common interests. Consequently, it is our intention to limit the term "confidential" so as to embrace only those employees who assist and act in a confidential capacity to persons who exercise "managerial" functions in the field of labor relations.

[43] It would make no sense to include within the coverage of the Act a research chemist having access to trade secrets, while excluding his "confidential" secretary or clerk. That result would not further the public policy of the Act, and it is one that should not be embraced without clear evidence that Congress so intended. Indeed, if it is assumed that some danger of unfair play may result when non-labor-related confidential information is placed in the hands of employees, it is more likely that harm could be done to the employer by professional employees who, by virtue of their training and expertise, are far more likely than clerical workers to understand the significance of the information they possess. Yet Congress deliberately chose not to exclude such persons from the protection of the Act.

"prevailing Board practice," and that practice—which had been consistently followed for nearly ten years prior to 1947—merely accorded a special status to confidential employees meeting the "labor nexus" test, excluding such employees only from participation in bargaining units composed of other employees.[44]

In sum, the Board's determination that non-managerial confidential employees are entitled to the full protection of the Act unless they assist and act in a confidential capacity to officials who formulate, effectuate, and determine labor relations policies, or have access to "strategic" labor relations information, is a longstanding and reasonable interpretation of the Act, which is entitled to substantial deference. See *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979). As the many cases cited in this brief illustrate, this interpretation has been the basis for widespread establishment and maintenance over many years of collective bargaining relationships that would be excluded from the Act's protection by the decision below. This long-observed implementation of the Act (a species of "law of the shop") has well served the statutory purpose of promoting peaceful resolution of labor-management disputes through collective bargaining and has not resulted in the compromising of employer-employee confidences.

Moreover, the reasonableness of the Board's limited implied exclusionary rule is well demonstrated by the

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[44] Contrary to the view expressed by the court below (Pet. App. 4a, 29a-30a), the exclusion of all employees having any type of confidential information is not compelled by the Court's observation in *Bell Aerospace Co.* (in concluding that managerial employees are excluded from the coverage of the Act) that "Congress could not have supposed that, while 'confidential secretaries' could not be organized, their bosses could be" (416 U.S. at 284, quoting 475 F.2d 491-492 (2d Cir. 1973)). That observation does not suggest that all "confidential employees" are excluded from the Act. The Court was merely answering the argument that, because Congress had mentioned confidential secretaries as persons intended to be excluded, and had not mentioned managerial employees, it could not be assumed that it intended to exclude managerial employees. See also 416 U.S. at 304-306 (White, J., dissenting).

consequences of the court of appeals' broader rule, which would exclude all employees with access to business information that the employer would keep confidential insofar as other employees, competitors, regulatory agencies, and the public are concerned (Pet. App. 8a). The rule formulated by the court of appeals would strike a major blow at white collar unionism, regardless of the care with which "business information" may be defined.[45] "Many, *if not most*, white collar workers are involved in something which may be argued to be 'confidential' in some general sense. There are matters of credit, of costs, of designs, of customer lists, of prices, of medical records —the list is endless" (Pet. App. 12a; Cudahy, J., dissenting; emphasis in original; footnote omitted). Even teachers, who are professional communicators, are ordinarily required to keep examination questions confidential prior to the administration of examinations. Similarly, journalists often protect the confidentiality of their sources, and they and news media production workers refrain from disclosing "scoops" before publication. Nor would the impact of this rule necessarily be limited to white-collar workers.[46] Many blue-collar employees

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[45] For example, if the term were confined to the widely-accepted definition of a "trade secret," bargaining rights would be denied to every employee with access to

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may [, for example,] be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

Kewanee Oil Co. v. *Bicron Corp.*, 416 U.S. 470, 474-475 (1974), quoting the *Restatement of Torts* §757, Comment b (1939).

[46] However, the Bureau of Labor Statistics reports that, by 1990, fully 50 percent of the nation's new jobs will be "white-collar"—including office clerical, professional, and technical positions. U.S. Bureau of Labor Statistics, Dep't of Labor, News, Doc. No. USDL 79-903 (Dec. 27, 1979).

must routinely have access to such matters as manufacturing processes and assembly procedures, which their employer intends to keep confidential with respect to customers and competitors. Indeed, as the Ninth Circuit observed in *Union Oil of California, Inc.* v. *NLRB*, *supra*, 607 F.2d at 853 (emphasis added), it is precisely because "*most* employees have an arguably confidential relationship with management" that the Board has historically "narrowly construed the definition of confidential employee." It is clear, moreover, that the ever-increasing complexity of modern industrial processes and commercial practices, together with the great strides that have been made in the area of data processing, have significantly increased the number of employees who, for the convenience of their employers, must have access to information that might properly be considered confidential. A rejection of the Board's narrow test would thus have a potentially staggering impact on the scope of protection accorded by the Act; "[i]f Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly." *NLRB* v. *Bell Aerospace Co.*, *supra*, 416 U.S. at 284-285 n.13.

II. THE BOARD PROPERLY DETERMINED THAT THE EMPLOYEES IN THESE CASES ARE NOT "CONFIDENTIAL EMPLOYEES" UNDER THE ACT

1. The 18 office employees whose status is at issue in *Malleable* had access, in the course of their duties, to business data—such as financial reports, cost and price data, and distributorship lists—that their employer would keep confidential as to the public, competitors, and other employees. Malleable has never claimed, however, that these employees assist and act in a confidential capacity to persons who exercise managerial functions in the field of labor relations, nor has it contended that any of them otherwise has access to confidential information that is directly related to labor relations maters. It is clear, therefore, that the Board properly declined to exclude

these persons from the bargaining unit as "confidential employees" with a "labor nexus." [47]

2. Similarly, the Board found in *Hendricks* (Pet. App. 43a-49a) that Weatherman had no "labor nexus" whatsoever, and the court of appeals unanimously agreed (*id.* at 27a). Dillon, Weatherman's principal, played a "most passive" role in labor relations matters (*id.* at 47a); he admittedly played no part in the formulation of Hendricks' labor policies or in the interpretation of its labor contracts, and he had "[v]ery little" (A. 23) to do with its negotiations with the union.[48] Moreover, Weatherman's duties were "deliberately restricted" (Pet. App. 45a) to preclude her from acting in a confidential capacity to Dillon with respect to the few labor relations matters that he did handle. For example, copies of correspondence sent to the union by Hendricks' attorneys were handed directly to Dillon by the office manager, without crossing Weatherman's desk, and reports on the status of ongoing union negotiations were personally delivered by Hendricks' attorneys to Dillon, who kept them in a private file behind his desk.[49] Moreover, Weatherman typed no internal memoranda concerning labor policies, and the only labor-related correspondence that she prepared were letters that she sent to Hendricks' attorneys transmitting the dates of union bargaining

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[47] Malleable notes (Br. Opp. 2 n.1) that it has also argued that 13 of these persons should be excluded from the bargaining unit as "managerial" employees, and that four of them should also be excluded as "supervisors." However, the court of appeals has not yet addressed these claims (Pet. App. 56a-59a), which therefore are not at issue here.

[48] *Brooklyn Daily Eagle, supra,* 13 N.L.R.B. at 986 & n.7, and its progeny—which deal with secretaries to executives who possess the "ultimate power of management" in its dealings with labor—are thus distinguishable.

[49] Compare *Illinois Consolidated Telephone Co., supra,* 61 N.L.R.B. at 454 (declining to treat as a "confidential employee" general auditor's secretary, who did not have access to his confidential labor relations reports).

sessions. On these facts, the finding of the Board and the court of appeals that Weatherman was not a confidential secretary with a "labor nexus" is manifestly correct.

Even if the legislative history of the Taft-Hartley amendments could be read to require the exclusion of confidential secretaries to all executives, without regard to any labor nexus, which it clearly cannot (see pages 24-29, 34-37, *supra*), the record here would provide no ground for excluding Weatherman under such a test.[50] Weatherman placed few of Dillon's phone calls, she did not memorialize their contents, she did not keep track of his appointments, she did not attend management or directors' meetings, and she was carefully shielded from access to such significant matters as the status of contract negotiations with the union (see pages 4-5, *supra*). Clearly, there has been no showing that Weatherman's "actual job responsibilities, authority, and relationship to management" (*NLRB* v. *Bell Aerospace Co.*, *supra*, 416 U.S. at 290 n.19) warrant her exclusion as a confidential secretary to an executive.

Finally, even if Weatherman were found to be a "confidential secretary"—and thus excludable from bargaining units composed of non-confidential employees—it would not follow that Hendricks was free to discharge her for engaging in protected, concerted activity. Because "confidential employees" are not excluded from the statutory definition of "employee" (Section 2(3) of the Act, 29 U.S.C. 152(3)), the Board has long held that truly

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[50] The decision below is not to the contrary. The court applied (Pet. App. 8a) the test enunicated in the 1947 House bill—a test that focuses not on an employee's confidential relationship to management, but on the nature of the information that passes through his hands—and rejected the Board's conclusion (*id.* at 20a) that Hendricks "simply did not have secret papers or documents." However, the court made no determination with respect to the status of Weatherman's purportedly "confidential" relationship to General Manager Dillon with respect to such papers or documents.

confidential employees—although excludable from rank-and-file bargaining units as a matter of sound labor policy—nevertheless enjoy the protection of the Act against employer unfair labor practices in circumstances such as those presented here. See page 18, note 14, *supra*. This position strikes a reasonable balance between employee rights expressly protected by Section 7 of the Act, 29 U.S.C. 157, and management's important interest in ensuring against the disclosure of confidential information. That Weatherman should be deemed to have been protected by the Act when she signed a petition calling for the reinstatement of a disabled fellow worker hardly impacts upon any interest in confidentiality that Hendricks might legitimately have.[51] Finally, whatever view the Eightieth Congress might have held concerning the Board's treatment of confidential secretaries (see pages 28-29, *supra*), the fact remains that after the Taft-Hartley amendments the Board continued its practice of excluding such persons from rank-and-file bargaining units, but not from statutory protection against unfair

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[51] Hendricks retains considerable power to ensure the confidentiality of such information: it can insist, as a condition of employment and on pain of discharge, that Weatherman keep to herself any knowledge that she might have of Hendricks' private affairs. See, *e.g.*, *American Window Glass Co.*, 77 N.L.R.B. 1030, 1032 (1948); see *Armour & Co.*, *supra*, 49 N.L.R.B. at 690-691. Moreover, the Board allows an employer such as Hendricks considerable leeway to engage in conduct (which might otherwise violate the Act) to protect its labor-related confidences from the union. Thus, an employer may question a confidential secretary about union membership, to determine whether he wishes to retain the secretary in a confidential capacity (*American Book-Stratford Press, Inc.*, *supra*, 80 N.L.R.B. at 915), and may transfer such an employee to a non-confidential job, so long as the transfer is effected to prevent possible disclosures of confidential matters (*Illinois Bell Telephone Co.*, 228 N.L.R.B. 942 n.1, 944 (1977); *Pope Maintenance Corp.*, 228 N.L.R.B. 326, 337-338 (1977), enforced, 573 F.2d 898 (5th Cir. 1978)), and not for the purpose of "punish[ing]" the employee for union activity (*Doxsee Food Corp.*, 218 N.L.R.B. 934, 935 (1975), enforced, mem., 529 F.2d 1030 (5th Cir. 1976)).

labor practices.[52] Indeed, this policy has continued without exception for more than 40 years.[53] In the intervening time, Congress has twice "reenacted the statute without pertinent change. * * * In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *NLRB* v. *Bell Aerospace Co., supra*, 416 U.S. at 275.

III. THE COURT OF APPEALS PROPERLY REJECTED HENDRICKS' CONTENTION THAT WEATHERMAN WAS A "PERSONNEL DEPARTMENT EMPLOYEE"

Hendricks contends (Cross-Pet. I-II) that the court of appeals erred in rejecting Hendricks' claim that Weatherman was a "personnel department employee" and therefore excluded from the coverage of the Act. As the court of appeals suggested (Cross-Pet. App. 27a; emphasis added), however, Hendricks' argument must be that Weatherman "work[ed] in a position *equivalent* to a personnel department employee" because Hendricks ac-

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[52] Compare *Detroit Harvester Co. (Dura Div.)*, 79 N.L.R.B. 1316, 1317-1318 (1948) (excluding confidential employees from rank-and-file bargaining unit), with *Coopersville Cooperative Elevator Co., supra*, 77 N.L.R.B. at 1084-1085 & n.6 (holding that confidential employees are entitled to statutory protection against unfair labor practices), and *American Book-Stratford Press, Inc., supra*, 80 N.L.R.B. at 915 (same).

[53] Significantly, Congress itself adopted a similar approach with respect to the treatment under the Act of plant guards, another class of employees whose membership in rank-and-file bargaining units may arguably create some conflict of interest. Thus, Section 2(12) of the House bill—which would have excluded guards from the Act altogether—was deleted in conference and replaced by a provision (now Section 9(b)(3) of the Act, 29 U.S.C. 159(b)(3)) that accords them statutory protection against unfair labor practices, but requires them to seek union representation separately from the rank-and-file. See H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 36 (1947).

tually has no personnel department. Moreover, Weatherman had nothing to do with employee grievances, discipline, or reward, and the only confidential personnel-type materials that she handled were employees' medical and disability insurance claim forms (see pages 4-5, *supra*). As Judge Cudahy properly noted (Pet. App. 10a; emphasis in original), "these were the confidences of *employees* she had to keep," and it is "simply ludicrous that one should be classified as part of 'management' and lose the protection conferred on 'labor' because one is entrusted with the confidences of one's fellow workers." On these facts, the court of appeals correctly rejected (Pet. App. 27a) Hendricks' contention.[84]

Nor is there merit to Hendricks' further contention (Cross-Pet. 15-16) that the Board failed to rule on this issue in the first instance. Although the ALJ, whose decision was adopted by the Board, did not discuss Weatherman's status as a "personnel department employee" separately from her status as a "confidential employee" with a "labor nexus," the relevant portion of the ALJ's decision (Pet. App. 44a-49a) clearly shows that, in finding that Weatherman did not have any access to confidential labor-related information, he also found that her duties with respect to personnel matters (such as they were) were insufficient to affect her status as an employee entitled to the full protection of the Act.

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[84] Even if, contrary to the showing above, Weatherman were a personnel department employee, this would not require that she be accorded special treatment under the Act, because she had no access to labor relations information of a strategic or sensitive nature that could (if disclosed) compromise her employer's dealings with the union.

CONCLUSION

The judgments of the court of appeals should be reversed insofar as enforcement of the Board's orders was denied.

Respectfully submitted.

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APPENDIX

Section 2 of the National Labor Relations Act, 29 U.S.C. 152, provides in relevant part:

When used in this subchapter—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, * * * as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

* * * * *

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organi-

zation as a condition of employment as authorized in section 158(a)(3).

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in relevant part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 9(b) of the National Labor Relations Act, 29 U.S.C. 159(b), provides in relevant part:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit * * *.

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